UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
NEWNAN DIVISION

IN THE MATTER OF:	:	**CASE NUMBER**
	:	
DEBBIE HUCKEBA	:	05-17339-WHD
MIKE A. HUCKEBA,	:	
	:	
	:	IN PROCEEDINGS UNDER
	:	CHAPTER 13 OF THE
Debtors.	:	BANKRUPTCY CODE

O R D E R

Before the Court is the Motion to Dismiss Case Pursuant to Section 109(g), filed by Albert Jones (hereinafter the "Movant") against Debbie and Mike Huckeba (hereinafter the Debtors). This matter constitutes a core proceeding over which the Court has subject matter jurisdiction. See 28 U.S.C. § 157(b)(2)(A); § 1334. Following an evidentiary hearing on the Motion, the Court took the matter under advisement.

FINDINGS OF FACT

In June 2001, the Debtors purchased real property, known as 5573 East Highway 166, Winston, Georgia (hereinafter the "Property"), from the Movant for a purchase price of $135,000. At the time of the purchase, the Debtors made a down payment of $40,000 and executed a promissory note in favor of the Movant in the principal amount of $95,000 (hereinafter the "Note"). The Note obligated the Debtors to repay the principal amount plus 6% interest through monthly payments of $500 per month. After purchasing the Property,

the Debtors obtained two mortgages on the Property. The Movant did not record the Note until after the subsequent mortgages had been recorded. The Debtors defaulted on their payments under the Note.

In August 2004, the Movant sued the Debtors on the Note in the Superior Court of Carroll County, Georgia. As a defense, the Debtors asserted that their personal liability under the Note had been discharged in bankruptcy. The Debtors had filed a voluntary petition under Chapter 7 of the Code on November 11, 2003, which was discharged on February 5, 2004. In response to the defense of discharge, the Movant filed a motion for summary judgment in which the Movant asserted that the debt was nondischargeable due to the fact that the Movant never received notice of the Chapter 7 bankruptcy filing. The state court granted summary judgment, finding that no genuine issue of material fact existed as to the Debtors' liability under the Note. The state court also noted that the Movant's counsel had "ably addressed the issue of [the Debtors'] bankruptcy," as the "[r]ecord shows that the [Movant's] debt was not scheduled by the [Debtors], and the Court notes that the [Movant's] uncontradicted affidavit establishes lack of notice or actual knowledge of the bankruptcy on his part until four months after the case was concluded."

On September 28, 2005, the Debtors filed a voluntary petition under Chapter 13. The Debtors did not list the Movant on the list of creditors provided to the Clerk's Office and did not otherwise provide the Movant with notice of the filing. The Debtors failed to file schedules or statement of financial affairs, failed to file a proposed Chapter 13 plan, and

failed to make payments to the Chapter 13 Trustee prior to confirmation. Although the Debtors appeared for the meeting of creditors scheduled for October 31, 2005, the Debtors' attorney did not appear, and the Chapter 13 Trustee could not conduct the meeting because the Debtors had not filed schedules or a plan. On December 8, 2005, the date upon which the Debtors' proposed Chapter 13 plan would have come on for hearing had it been filed, the Chapter 13 Trustee could not recommend confirmation and instead recommended dismissal. The Movant also filed an objection to confirmation of the plan and moved for dismissal of the case pursuant to section 109(g)(1).

CONCLUSIONS OF LAW

Throughout this proceeding, the Movant and the Debtor have focused on the issue of whether the state court properly determined that the debt owed by the Debtors to the Movant was not discharged by the Debtors' Chapter 7 discharge. That issue is simply not relevant to the matter before the Court. The motion before the Court simply requires the Court to determine whether the Debtors' current Chapter 13 case should be dismissed pursuant to section 109(g) and does not require the Court to determine whether the debt was discharged.

The Movant has argued that, in order for the Court to determine that the Movant has standing to prosecute his motion, the Court must first determine that the Movant's debt was not discharged. The Court disagrees. The Movant need not be a creditor in order to have

standing to seek dismissal of the Debtors' case. All parties in interest have standing to file and be heard on such a motion. *See* 11 U.S.C. § 1307(c) ("[O]n request of a party in interest . . . the court may . . . dismiss a case . . . for cause . . . ."). To be a party in interest, the Movant must only establish that his interests will be sufficiently affected by the litigation before the Court. *See In re Gilchrist*, 309 B.R. 404 (10th Cir. BAP 2004) (parties in interest include "all persons whose pecuniary interests are directly affected by the bankruptcy proceedings"); *In re Camden Ordnance Mfg. Co. of Ark., Inc.*, 245 B.R. 794 (Bankr. E.D. Pa. 2000) (to determine whether a party is a party in interest, "'courts must determine on a case by case basis whether the prospective party in interest has a sufficient stake in the proceeding so as to require representation.'").

Here, the Movant holds a post-bankruptcy judgment from the state court, which the Movant contends necessarily implicates a finding by the state court that the debt was not discharged by the Debtors' previous Chapter 7 discharge. Accordingly, the Movant has an interest in assuring that the Debtors are not eligible to file a subsequent bankruptcy proceeding, which would necessarily delay the Movant's ability to collect on his judgment and would provide the Debtors a convenient forum in which to continue to assert that the debt was discharged. It is clear that Movant's interest in this matter would be sufficiently affected to render Movant a party in interest, regardless of whether Movant's claim was actually discharged in the previous case.

Section 109(g)(1) of the Bankruptcy Code provides that "no individual . . . may be

a debtor under this title who has been a debtor in a case pending under this title at any time in the preceding 180 days if . . . the case was dismissed by the court for willful failure of the debtor to abide by orders of the court, or to appear before the court in proper prosecution of the case." 11 U.S.C. § 109(g)(1). "In the absence of evidence that the debtor *willfully* failed to prosecute the prior case or *willfully* failed to obey a court order, the section 109(g)(1) bar to eligibility may not be imposed." COLLIERS ON BANKRUPTCY, ¶ 109.08 (15th ed. rev. 2006) (emphasis in original).

For purposes of section 109(g)(1), "willful" means "deliberate or intentional." *See Walker v. Stanley*, 231 B.R. 343 (Bankr. N.D. Cal. 1999); *see also In re Hollis*, 150 B.R. 145 (D. Md. 1993) (willful act is one that is "intentional, knowing, and voluntary"). In defense of a motion to dismiss pursuant to section 109(g)(1), the debtor must be permitted to present evidence that indicates that the debtor's failure to prosecute the case was not deliberate or intentional. *See In re DeBerry*, 1998 WL 34342252 (Bankr. E.D. Va. 1998) (where debtor confused the date for her first meeting of creditors, the court found that the debtor's excuse was sufficient, in the absence of contrary evidence presented by the creditor, to support a finding that the debtor's failure to prosecute the case was not willful); *In re Faulkner*, 187 B.R. 1019 (Bankr. S.D. Ga. 1995) (where debtor established that his failure to make payments under Chapter 13 plan was caused by medical problems, court found no basis upon which to apply section 109(g)(1)). For example, in *In re Walker*, the court recognized that a "mere failure to make a payment under a Chapter 13 plan or failure to appear at the first

meeting or a court hearing, will not, in itself, be sufficient to sustain a finding of willful conduct." *Walker v. Stanley*, 231 B.R. at 348. The court did note, however, that "repeated failure to appear or lack of diligence" is evidence that the debtor's conduct is willful. *Id*. Similarly, in *In re Arena*, 81 B.R. 851 (Bankr. E.D. Pa. 1988), the court established three bases for determining that a debtor acted willfully for purposes of section 109(g)(1): 1) the debtor's admission of willful conduct; (2) the debtor's lack of credibility in denying willful conduct; or (3) adverse inferences drawn from the circumstances that indicate that repeated filings were intended as an abuse of the Bankruptcy Code.

Here, the Debtors filed the Chapter 13 petition, but did not file schedules or a proposed Chapter 13 plan and did not make any payments to the Chapter 13 Trustee. The Debtors appeared at the first meeting of creditors, but the Chapter 13 Trustee could not conduct the meeting because no plan or schedules had been filed. During the evidentiary hearing, Mrs. Huckabe testified that she did not file schedules or a plan because her attorney, Ms. Silvo, was hospitalized and could not assist the Debtors in preparing the schedules and plan. She also testified that, by the time her attorney was able to assist the Debtors in preparing these documents, the Debtors' financial condition had worsened to the point that the Debtors knew that they could no longer propose a confirmable Chapter 13 plan. At that point, the Debtors determined that the best course of action was to allow the Chapter 13 case to be dismissed at the confirmation hearing. The Movant does not dispute that the Debtors' attorney was hospitalized and presented no evidence to counter the testimony as to the

impact of this hospitalization on the Debtors' ability to prosecute their case. This testimony is supported by the fact that the Debtors appeared at the meeting of creditors, but their attorney did not. The Court, therefore, finds no reason to doubt that the Debtors' failure to prosecute the instant case was directly related to their attorney's medical condition and their worsening financial condition. Further, this case was the Debtors' first Chapter 13 filing. As such, the Debtors have no history of failing to prosecute Chapter 13 cases from which the Court could infer that the Debtors willfully failed to prosecute this case.

Much of the Movant's factual allegations are pertinent not to whether the Debtors willfully failed to abide by the Court's orders or failed to appear in proper prosecution of the case, but are instead germane to the question of whether the Debtors filed the Chapter 13 petition in good faith. Failure to file the petition in good faith is a basis for dismissal under section 1307. However, whether the case should be dismissed is not at issue, as the Debtors have not opposed the dismissal of the case. Additionally, although bad faith and egregious conduct is relevant to a motion to dismiss with prejudice under section 349, section 349 is not at issue here, as no such relief has been requested in this case. *See In re Leavitt*, 171 F.3d 1219 (9th Cir. 1999); *Walker v. Stanley*, 231 B.R. 343 (Bankr. N.D. Cal. 1999). Having considered the testimony presented and the arguments of counsel, the Court cannot conclude that the Debtors willfully failed to abide by the Court's orders or to appear in proper prosecution of their case. Accordingly, the Court cannot dismiss the case pursuant to section 109(g)(1). However, because the Debtors have failed to prosecute this case and have failed to propose a confirmable plan, dismissal pursuant to section 1307 is appropriate.

CONCLUSION

The Movant's Motion to Dismiss with Prejudice is hereby **DENIED**, and the Debtors' case is hereby **DISMISSED**.

IT IS SO ORDERED.

At Newnan, Georgia, this _____ day of June, 2006.

_____
W. HOMER DRAKE, JR.
UNITED STATES BANKRUPTCY JUDGE